LIM BUA

v.

NG KIAN HENG

HIGH COURT, MUAR
TUAN RICHARD TALALLA J.
[CIVIL SUIT NO. 22-12A-90]
20 JANUARY 1993

LAND LAW: Plaintiff holding land on trust - Claim that declaration of trust was wrongly procured and executed under undue influence - Plaintiff seeking declarations that declaration of trust void and for transfer of land to her as registered and absolute owner - Whether plaintiff entitled to declaration - Whether claim proved.

EVIDENCE: Presumption of existence of facts - Section 114(e) Evidence Act 1950 - Prima facie evidence that documents rightly and regularly executed - Sections 101, 102 & 103 Evidence Act 1950.

The plaintiff held land in Grisek (the Land) as trustee for the defendant. She claimed that her late husband had wrongfully procured and by undue influence induced her to execute a declaration of trust over the Land, which she claimed was solely paid for by her, and said that that was how she came to hold the Land as trustee for the defendant. The plaintiff sought a declaration to the effect that the declaration of trust was void and an order that the Land be transferred to her as the registered and absolute owner thereof.

The defendant denied the plaintiff's claim and relied on the memorandum of transfer and the declaration of trust as being what those two documents on their face value were. He claimed that they were duly and regularly executed and counter-claimed for transfer of the Land to him as the registered and absolute owner.

Held:

[1] The memorandum of transfer and the declaration of trust disclosed *prima facie* that they were rightly and regularly executed. The onus of establishing that the documents were not rightly and regularly executed was on the plaintiff and she had failed to discharge that onus. There was not one whit of evidence, other than the plaintiff's own testimony, pointing to irregularity in regard to the execution of either of the documents.

[2] There was no independent evidence pointing to misconduct or irregular conduct on the part of either the attesting solicitor or the plaintiff's husband relating to the transaction in question.

[3] It was perfectly natural that the plaintiff's husband being the conservative Chinese man he was would have wanted the Land to go to his natural grandson, the defendant, who bore his surname and not to the plaintiff who was his second wife nor to her natural children by him, they being all daughters, nor to her son who was adopted and not related by blood.

[Plaintiff's claim dismissed with costs. Defendant's counter-claim allowed with costs].

Cases referred to:

Kang Moi Lan @ Kang Hoi Lan v. Kang Ah Lang @ Kong Ah Moy [1993] 2 CLJ 455 ***(refd)***

Yew Phaik Hoon v. Quah Ooi Keat & Anor. [1969] 2 MLJ 32 ***(refd)***

Legislation referred to:

Evidence Act 1950, ss. 101, 102, 103, 114(e)
Rules of the High Court 1980, O. 28

Other sources referred to:

Sarkar on Evidence, 13th. Edn., p. 1037

For the plaintiff - M/s. Philip Chua & Co.
For the defendant - M/s. G.F. Nelson & Co.

JUDGMENT

Richard Talalla J:

This action started as an originating summons in the High Court Johor Bahru wherein the defendant was the applicant seeking an order, *inter alia*, terminating the plaintiff's trusteeship of certain land (the Land) in the Mukim of Grisek held under registered title. The action was subsequently transferred to the Court sitting here whereafter the originating summons, pursuant to the provision of O. 28 of the Rules of the High Court 1980, was ordered to be continued as if begun by writ, with Lim Bua as the plaintiff and Ng Kian Heng as the defendant. There were consequential directions for the filing of the usual pleadings by both parties and in the event a statement of claim, defence and counterclaim, and reply and defence to counterclaim were filed.

The plaintiff's pleaded case was that it was she who purchased the Land which was solely paid for by her, from monies being her own savings collected over several years before the execution of the transfer, that her late husband

wrongfully procured and by undue influence induced her to execute a declaration of trust and that was how she come to hold the Land as trustee for the defendant. She pleaded that the document of title to the Land was at all times in the custody of her husband and that she only discovered that the Land was registered in her name as trustee upon the husband's death and upon the defendant then demanding the title. She pleaded that she executed the declaration without proper legal advice and that it was neither read nor explained to her. She complained that she was uneducated and illiterate and she sought a declaration to the effect that the declaration was void and an order that the Land be transferred to her as the registered and absolute owner thereof. The defendant on the other hand denied the plaintiff's pleaded claim and relied on the memorandum of transfer and the declaration of trust as being what those two documents on their face value were. He claimed that they were duly and regularly executed. In consequence the defendant counterclaimed *inter alia* transfer of the Land to him as the registered and absolute owner.

Section 114 of the Evidence Act (the Act) with its illustration (e) provides that the Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case and that judicial and official acts have been regularly performed. The illustration constitutes an application of the maxim *omnia praesumuntur rite esse acta* that is all acts are presumed to have been rightly and regularly done. As stated in Sarkar on Evidence, thirteenth edition, page 1037, the foundation for the maxim is that every person whether in his private or official character, does his duty and unless the contrary is proved, it is presumed that all things are rightly and regularly done.

The two documents disclosed *prima facie* that they were rightly and regularly executed. By virtue of s. 101, 102 and 103 of the Act the onus of establishing that the documents were not rightly and regularly executed was on the plaintiff. The plaintiff failed to discharge that onus. There was not one whit of evidence, other than the plaintiff's own testimony pointing to irregularity in regard to the execution of either of the documents.

Counsel for the plaintiff in his written submission said that it was understandable and natural for the plaintiff to have depended completely and trustingly on her husband and to carry out implicitly his instructions regarding the purchase of the property and that this Court ought to take judicial notice of the fact that during the era of the plaintiff's younger days it was the custom amongst Chinese women for such a woman to depend completely on and obey without question the commands of her husband. I do accept that that was the situation, the background situation, in this case just as much as in the case of *Kang Moi Lan @ Kang Hoi Lan v. Kang Ah Lang @ Kong Ah Moy* [1993] 2 CLJ 455, which I decided yesterday, it was regarding filial respect and obedience in an old conservative Chinese family. In this light there is also the case of *Yew Phaik Hoon v. Quah Ooi Keat & Anor.* [1969] 2 MLJ 32 to be considered. Such being the admitted situation of the plaintiff in relation to her late husband, I find that the Land was the husband's to do with as he liked. Even if it was purchased with money being wholly or in part the plaintiff's earnings, I find that the money constituted pooled family funds which were controlled by and to be spent as the husband thought fit. I find that the plaintiff without question obeyed the direction of her husband to execute the two documents in the way they were executed and that she knew at the time that she was to hold the Land in trust for the defendant, or she chose not to know, leaving it completely to her husband to do as he pleased with the Land, that being his prerogative as patriarch of this admittedly old Chinese family, and therefore she must be taken to have agreed with him that the Land was to be transferred to her as trustee to hold for the defendant.

The plaintiff's case amounts to a contradiction in terms of the submission of her Counsel that she was an old-fashioned and conservative Chinese woman completely dependent on and obeisant to her husband. How could she have been obedient to her husband if at the time the documents were being executed she would have objected to signing them and demanded transfer to herself absolutely? I find that the plaintiff would not have done that. I find that like the good old-fashioned Chinese wife she was, she meekly obeyed the bidding of her husband and held the property on trust for the defendant.

The plaintiff's case is such that it amounts to her saying that her husband deceived her by not having the Land transferred to her absolutely but to the defendant in respect of whom she was to hold on trust. I do not believe that her husband deceived her so or at all. Her complaint in this regard must be weighed against the fact that her husband is dead and cannot speak in defence of the accusation. The complaint comes far too late. In this regard it is observed that it was not the plaintiff who commenced legal proceedings seeking redress but the defendant who did so. I do not believe her story that she came to know the situation about the Land only when the defendant made demand. If the plaintiff was that independent of her husband and dominating enough to demand , at the time the Land was bought, transfer to herself absolutely against the obvious wishes of her husband, she would also have been equipped with initiative sufficient to ascertain that the Land was transferred to her absolutely and not as trustee for the defendant or at least she would have discovered the so-called deception very much earlier, in all probability in her husband's lifetime and confronted him with it.

The plaintiff's case also amounts to her saying that the attesting solicitor, the late Mr. S. Shanmugam, either conspired with her husband to deceive her or alternatively that he was reckless or negligent in participating in the execution of documents by the plaintiff the contents of which were not explained to her and of which she as not aware. The said solicitor had certified expressly that the plaintiff acknowledged to him, *inter alia*, that she understood the contents and effect of the instrument that she executed. Again I find that there is not one iota of independent evidence pointing to misconduct or irregular conduct on the part of the solicitor, who as against the plaintiff's self-serving testimony, must be accepted as having been honest and competent in the part he played in the transaction in question. Once again that person being dead, his reputation cannot be defended.

I find that it was perfectly natural that the deceased being the conservative Chinese man he was would have wanted the Land to go to his natural grandson the defendant who bore his surname and not to the plaintiff who was his second wife nor to her natural children by him, they being all daughters, or to her son who was adopted and apparently not related by blood. Also the defendant was a minor at the time of the transfer and once again it was normal and natural that the Land be held by the plaintiff who was much younger, 18 years younger, than her husband on trust for the defendant until he came of age. On the plaintiff's own testimony the defendant was brought up by his grandfather the plaintiff's husband. Furthermore the husband did provide for all his children, had given land to all of them including the adopted son and accordingly there appeared to be nothing extraordinary in his having given this land to the defendant.

I did not believe the plaintiff when she testified to the effect that she only saw a Chinese man at the office of the said solicitor thus indicating that she had not gone before Mr. Shanmugam. Neither did I believe her when she said that she did not go before Mr. Ooi Sam Heng, an advocate and solicitor. In fact Mr. Ooi gave evidence to the effect that on two occasions she appeared before him and on each such occasion she affirmed before him an affidavit of documents, he being a Commissioner of Oaths.

The evidence points to the defendant not being on good terms with the plaintiff from the time he was ten years old, nor did the defendant's father get on well with the plaintiff who was the latter's stepmother. That was not surprising. The stepmother relationship is often a strained one. In this instance the strain flowed on to the defendant, hence a basis for the plaintiff resenting and consequently objecting to transfer of the Land to the defendant.

The plaintiff's claim is dismissed and the defendant's counterclaim is allowed. The defendant is to have the costs of the action and the counterclaim, to be taxed.